

D-7

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

April 13, 2006

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Oahu

Re-Submittal: Forfeiture of Grant of Non-Exclusive Easement
S-5195, George W. Playdon Jr., Kaluanui, Oahu, Tax Map Key:
5-3-08:028 (Seaward)

PURPOSE:

Forfeiture of Grant of Non-Exclusive Easement S-5195, George W.
Playdon, Jr., Grantee.

LEGAL REFERENCE:

Section 171-39, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Kaluanui, Oahu, identified by Tax
Map Key: 5-3-08:028(seaward), consisting of approximately 487 sq.
ft., as shown on the attached map labeled Exhibit A.

AREA:

487 sq. ft. more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State
Constitution: YES _____ NO X

CHARACTER OF USE:

Right, privilege and authority to construct, use, maintain, and
repair the seawall.

TERM OF EASEMENT:

50 years, commencing on June 23, 1989 and expiring on June 22, 2039.

ANNUAL RENTAL:

\$615.00 per annum with rental re-openings on the 10th, 20th, 30th, and 40th years of the lease term.

BACKGROUND:

This request was on the November 18, 2005 Land Board agenda as Item D-15. Staff requested and the Board granted a deferral due to Mr. Playdon being out of town on November 18, 2005. Mr. Playdon would like to present his case to the Board on this easement forfeiture submittal.

REMARKS:

On August 12, 2003, pursuant to the authority granted the Chairperson by the Board of Land and Natural Resources at its meeting of January 11, 1980 and the breach provision contained in the Grant of Non-Exclusive Easement S-5195, George W. Playdon Jr., Grantee, was served a Notice of Default by certified mail dated August 12, 2003 for:

 X Failure to post required performance bond

Said notice, accepted by the Grantee on August 19, 2003, offered the Grantee a sixty-day cure period to correct the default. This cure period expired on October 19, 2003. As of the date of preparation of this submittal, March 31, 2006, this breach has not been cured.

As of April 13, 2006, the current status of all easement compliance items are as follows:

RENT:

\$615.00 Annual Rental
The Grantee is current with all rental obligations.

INSURANCE:

The Grantee has posted the required liability insurance policy.

PERFORMANCE BOND:

\$1,230.00
The Grantee has not posted the required performance bond.

CONSERVATION PLAN:

Not required.

Background:

Grant of Non-Exclusive Easement S-5195 was issued to Mr. George W. Playdon, Jr. on March 3, 2000. Section 25 of the document requires a performance bond in the form of a surety bond. Since the document execution, no bond has been posted and Mr. Playdon believes it is not necessary to post one.

Board Submittal Preparations:

Staff has been trying to bring this matter to the Board since November of 2005. This forfeiture submittal was listed for the November 18, 2005 Board meeting, under agenda item D-15, but was not presented to the Board because Mr. Playdon was not able to attend the meeting. Staff prepared a forfeiture submittal for the December 9, 2005 meeting, but Mr. Playdon could not attend due to business off-island. Staff processed another submittal for the January 27, 2006 meeting, and Mr. Playdon again was not able to attend due to his heavy work schedule. We now are able to present this re-submittal for forfeiture of Grant of Non-Exclusive Easement S-5195 issued to Mr. Playdon.

File History: Grant of Non-Exclusive Easement S-5195.

The file begins with a letter from Mr. Playdon to Mr. Dean Uchida of the Land Division on January 20, 1989. Mr. Playdon wanted to construct a house on his shoreline lot in Kaluanui, Oahu, just past Punaluu, Oahu. The seawall was there prior to Mr. Playdon's purchase of the lot. Mr. Playdon required a shoreline certification in order to obtain a building permit from the County. The State, through Mr. Uchida, required that either the seawall encroachment be removed or an easement be obtained pursuant to HRS 171-39.

The State Survey Office shows that the shoreline was last certified on October 20, 1987, by State Land Surveyor Paul Nuha. The Land Division's files show another shoreline certification rejected on January 24, 1989 because of the seawall encroachment. Chapter 13-222 of the Hawaii Administrative Rules, entitled "Shoreline Certifications", was adopted on December 10, 1988 and amended on March 29, 2003. Our files do not reflect that Mr. Playdon's shoreline was certified after the rejection on January 24, 1989.

Research undertaken by the Land Division at that time established that Mr. Playdon did not construct the wall. The wall was constructed prior to 1956 and Mr. Playdon bought the lot in 1987.

On May 5, 1989, Dona L. Hanaike of the Attorney General's Office wrote to Mr. Playdon and referred to a meeting that she had with him to resolve this encroachment. She noted that the resolution will require that the Department of Land and Natural Resources certify the shoreline at the bottom or the "toe" of the revetment and that Mr. Playdon would purchase an easement over the seawall outside of his property line. There is an agreement notation at the bottom of the letter where Mr. Playdon agreed to purchase an easement on May 16, 1989.

On June 23, 1989, under Item F-16, the Land Board approved the issuance of the easement to Mr. Playdon. One of the conditions of the Board's approval was the securing of a lease performance bond in an amount equal to twice the annual lease rental.

On June 30, 1989, Mr. Playdon wrote to Mr. Uchida and acknowledged approval of the easement by the Land Board, and inquired when the shoreline would be certified so that he could proceed with the building permit process.

We note that it was not until a year later, on May 16, 1990, that the appraisal contract was signed to establish the rental. On August 8, 1990 a request was sent to our Fiscal Office to set up an account for Mr. Playdon under G.L. S-5195, to commence on June 23, 1989. On September 28, 1990, the easement documents were sent to Mr. Playdon for execution.

Next in the file is a letter from our office dated January 21, 2000, asking Mr. Playdon if he had lost the documents sent to him on September 28, 1990 for execution. Apparently these documents were lost, for on February 15, 2000, another set of documents for Grant of Non-Exclusive Easement S-5195 were sent out to Mr. Playdon for execution. On March 3, 2000 this second set of easement documents was fully executed.

We note that the process to execute this easement took over ten years but it was managed as if the easement was executed since June 23, 1989, with numerous default letters sent out for no insurance or performance bond coverage.

In conversations with staff, Mr. Playdon has indicated he believes the performance bond is not necessary and paying the annual rental should be enough. He believes he should not be required to put additional funds, like a security deposit, into this easement, when the seawall was already there when he bought the property.

The current practice of issuing seawall easements involves standard legal requirements such as posting a performance bond and providing insurance coverage. The Department requires each easement grantee to conform to the standard legal requirements and knows of no reason why there should be an exception in this instance.

Item 25 of the subject easement document requires the following: "The Grantee shall, at its own cost and expense, within thirty (30) calendar days after the date of receipt of this easement document, procure and deposit with the Grantor and thereafter keep in full force and effect during the term of this easement a good and sufficient surety bond, conditioned upon the full and faithful observance and performance by Grantee of all the terms, conditions, and covenants of this easement, in an amount equal to two times the annual rental then payable. This bond shall provide that in case of a breach or default of any of the easement terms, covenants, conditions, and agreements, the full amount of the bond shall be paid to the Grantor as liquidated and ascertained damages and not as a penalty".

In light of Mr. Playdon's refusal to obtain the required bond, Staff believes it has no other alternative but to respectfully request the termination of Mr. Playdon's Grant of Non-Exclusive Easement S-5195.


RECOMMENDATION: That the Board:

1. Authorize the cancellation of Grant of Non-Exclusive Easement S-5195 in the manner specified by law;
2. Authorize the retention of all sums heretofore paid or pledged under Grant of Non-Exclusive Easement S-5195 as liquidated damages.
3. Terminate the Grant of Non-Exclusive Easement S-5195 and all rights of the Grantee and all obligations of the Grantor effective as of April 13, 2006, provided that any and all obligations of the Grantee which have accrued up to said effective date or which are stated in Grant of Non-Exclusive Easement S-5195 to survive termination shall endure past such termination date until duly fulfilled, and further provided that Grantor reserves all other rights and claims allowed by law; and
4. Authorize the Department of the Attorney General, the Department of Land and Natural Resources, or their agents to collect all monies due the State of Hawaii under Grant of

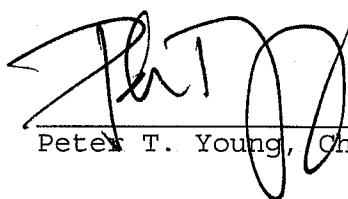
Non-Exclusive Easement S-5195 and to pursue all other rights
and remedies as appropriate.

Respectfully Submitted,



 Cecil Santos
Oahu District Land Agent

APPROVED FOR SUBMITTAL:



Peter T. Young, Chairperson

